Supreme Court, U.S.
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No. 07-113

In the
Supreme Court of the United States

CITY OF CINCINNATI,
Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether strict judicial scrutiny applies to a municipality's discretionary "lowest and best bid" determination that, as part of a non-exhaustive list of factors, includes permissive consideration of bidders' good faith outreach efforts to use minority-owned and women-owned subcontractors.

LIST OF PARTIES

Petitioner: City of Cincinnati

Respondent: Cleveland Construction, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, City of Cincinnati, Ohio, respectfully prays that a writ of certiorari be issued to review the final judgment of the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio.

OPINIONS BELOW

The Entry of the Court of Common Pleas, Hamilton County, Ohio, was filed July 13, 2005.[1] Asserting equal protection deficiencies, that Entry enjoined the City from applying permissive subcontracting outreach requirements used to track bidders' efforts to promote the participation of minority-owned and women-owned subcontractors to the extent of their specified availability.[2] On other issues, the trial court ruled, in part, in favor of Cleveland Construction, Inc. and, in part, in favor of the City of Cincinnati.

By Opinion dated December 8, 2006, the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio (herinafter referred to as the "Ohio First District Court of Appeals"), affirmed the Entry of the Court of Common Pleas enjoining the City's subcontracting outreach requirements.[3] In an opinion filed May 2, 2007, the Supreme Court of Ohio accepted the City's appeal for review on due process and damages issues. The Supreme Court of Ohio did not accept the

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[1] App. 53, *et seq.*

[2] App. 74.

[3] App. 11, *et seq.* The First Appellate District also ruled in favor of Cleveland Construction on due process and damages issues.

City's appeal challenging the lower courts' rulings enjoining the City's subcontracting outreach requirements.[4]

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> ****nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Cincinnati Municipal Code §321-37 requires:

> (a) Selection of Lowest and Best in Award of City Contracts: Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the *lowest and best* bidder.
>
> * * * * * * *
>
> (c) Factors to be Considered: Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, *but are not limited to*:
>
> (1) Information concerning the bidder's performance on prior and current contracts with the city; or

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[4] App. pp. 1-6.

(2) Information concerning the bidder's current, past and proposed payment of prevailing wages; or

(3) Information concerning compliance with the "Non-Discrimination in Purchasing and Contracting" rules and regulations issued by the city manager pursuant to CMC Section 321-159; or

(4) *Information concerning compliance with the "SBE Subcontracting Outreach Program" rules and regulations issued by the city manager pursuant to CMC Section 323-31.*

In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, the contract award *may* be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower.[5]

Cincinnati Municipal Code §321-43 provides:

Bid; Rejection of Bids.

The city purchasing agent, city manager or any other duly authorized contracting officer *may reject any bid for any reason or all bids for no reason if acceptance of the lowest and best bid is not in the best interests of the city.*[6] Where there is reason to believe

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[5] Emphasis added.

[6] Emphasis added.

there is collusion or combination among bidders, the bids of those involved shall be rejected.

Cincinnati Municipal Code §321-67 provides:

Proposal; Rejection.

The city may reject any or all proposals or any item within a proposal for any reason, or reject all proposals for no reason as deemed by the city purchasing agent or designee to be in the best interest of the city.

Cincinnati Municipal Code §321-159 provides:

Non-Discrimination in Purchasing and Contracting.

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of a Non-Discrimination in Purchasing and Contracting Program, substantially in conformance with the content of Part II, Section 2, the "Legislative Recommendation Report To The City of Cincinnati" dated December 17, 2002, prepared by Griffin & Strong, P.C., (hereinafter referred to as the "Legislative Recommendation Report"), a copy of which is on file in the office of the Clerk of City Council.

Cincinnati Municipal Code §321-1-A2 provides:

Award.

"Award" shall mean the written notice of a bid or proposal by the city purchasing agent, board or commission or their designee. The written notice may be a separate document or the contract itself prepared

by the city purchasing agent or designee. The city may cancel an award at any time before the execution of the contract without any liability against the city.[7]

Cincinnati Municipal Code § 321-1-B provides:

Best Interest of the City.

"Best interest of the city" shall mean any decision made by the city manager or city purchasing agent or their designee that the officer concerned believes a specific bid may be of benefit to the efficiency or effectiveness of the operation of the city. *This is a matter of discretion and the decision of the officer concerned is final.*[8]

Cincinnati Municipal Code §321-1-M provides:

May.

"May" denotes the permissive.[9]

Cincinnati Municipal Code §323-5 provides:

Rules and Regulations.

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of the small business enterprise program authorized by this chapter.

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[7] Emphasis added.

[8] Emphasis added.

[9] Emphasis added.

Cincinnati Municipal Code §323-7 provides:

Program Goals.

(a) The City of Cinc nati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction supplies, services, and professional services. The city of Cincinnati MBE/WBE annual participation goals of 30% construction, 15% supplies/services, and 10% professional services will be monitored, tracked internally, and reported annually to city council along with annual SBE participation rates.

(b) SBE participation is counted as follows:

(1) Once a firm is determined to be an eligible SBE, in accordance with this policy, the total dollar value of the contract awarded to the SBE is counted toward the SBE participation rate.

(2) The City of Cincinnati or a contractor may count toward its SBE rate a portion of the total dollar value of a contract with an eligible joint venture equal to the percentage of the ownership and contract of the SBE partner in the joint venture.

(3) The City of Cincinnati or a contractor may count toward its SBE rate only expenditures to SBEs that perform a "commercially useful function" in the work of a contract. An SBE is considered to perform a "commercially useful function" when it is responsible for execution of a distinct element of the work of a contract and

carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether an SBE is performing a commercially useful function, the City of Cincinnati or a contractor shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

(4) Consistent with normal industry practices, an SBE may enter into subcontracts. If an SBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the SBE shall be presumed not to be performing a commercially useful function. The SBE may present evidence to rebut this presumption to the City of Cincinnati.

Cincinnati Municipal Code §323-17 provides:

City Maintained Records and Reports.

(a) The effectiveness of this program will be measured by a review of data indicating prime and subcontract awards to SBEs, MBEs, and WBEs. Program effectiveness measurements will also include efforts by the city of Cincinnati staff to provide prime contracting opportunities for SBEs. At the end of each contract, the office of contract compliance will prepare a report on the utilization of firms in the SBE program. Data in this report will include information on the gross income size of the firms participating on each contract. Each project manager and procurement officer will continuously maintain, and compile monthly,

information relating to the departments' use of SBEs, including information regarding subcontractors and efforts toward SBE program participation. Data on MBE and WBE utilization will be used to determine if there are barriers to their participation which persists despite efforts to assist SBEs.

(b) At the end of a contract, the city shall require a contractor to report to OCC the identity of each SBE to whom the contractor has awarded a subcontract for the purchase of services, professional services, supplies, materials, and equipment.

(c) The city of Cincinnati shall prepare annually a consolidated report based on a compilation and analysis of the reports submitted by each project manager and procurement officer, and information provided by the finance department. This record-keeping system identifies and assesses SBE, MBE and WBE contract awards, prime contractors' progress in achieving SBE subcontract participation, and other SBE development and contracting efforts. Specifically, the OCC in conjunction with all city agencies will maintain records showing:

(1) Awards to SBEs, including names of contractors and subcontractors, nature of the work and services performed, and the percentage of SBE, MBE and WBE participation per contract. The city of Cincinnati will obtain regular reports from prime

contractors on their progress in meeting contractual SBE commitments;

(2) Specific efforts to identify and award contracts to SBEs;

(3) Copies of direct mailings to SBEs;

(4) Pre-bid conference information as it relates to the SBE program;

(5) Requests for assistance from the SBEs interested in bidding or proposing on city of Cincinnati contracts and subcontracts;

(6) Workshops, seminars and training programs conducted for SBEs; and

(7) Efforts to assist SBEs in acquiring bonding and insurance.

(d) The city of Cincinnati staff will submit annual SBE development reports to city council. These reports shall include:

(1) The number of contracts awarded to SBEs, MBEs, and WBEs;

(2) A description of the general categories of contracts awarded to SBEs, MBEs and WBEs;

(3) The dollar value of contracts awarded to SBEs, WBEs and MBEs;

(4) The percentage of the dollar value of all contracts awarded to SBEs, MBEs, and WBEs during the preceding year;

The actual dollar amount paid to SBE, WBE, MBE and non SBE vendors as prime or subcontractors;

The percentage of dollar amount paid to SBE, WBE, MBE compared to the total.

(5) The MBE information will be further desegregated by the following minority group designations as defined in Section 323-1-M1: African American, Hispanic, Asian American, and Native American.

The city of Cincinnati does not discriminate against any company or group of companies in its contracting and procurement activities on the basis of race, color, age, religion, sex, national origin, handicap/disability or veteran status. The SBE opportunity does not propose any numeric goals determined by the rate of program participation by minorities or women, but will require this information at the end of city contracts. The program is designed to include all segments of the region's business community by increasing the competitiveness and profitability of all small businesses as defined within this program.

Cincinnati Municipal Code §323-31 provides:

Subcontracting Outreach Program.

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program, substantially in

> conformance with the content of Part II, Section 1, the "Legislative Recommendation Report To The City of Cincinnati" dated December 17, 2002, prepared by Griffin & Strong, P.C., (hereinafter referred to as the "Legislative Recommendation Report"), a copy of which is on file in the office of the Clerk of City Council.

The City's Small Business Enterprise Program Rules and Guidelines describe the aspects of the subcontracting outreach program related to minority-owned and women-owned firms and their "signficant underutilization:"

> [T]he City seeks to afford its citizens equal opportunities to do business on City contracts and to ensure that all bidders, vendors and contractors ... doing business with the City provide to businesses owned and controlled by racial minorities and ethnic minorities and women, opportunities to participate, to the extent of their availability, on contracts which are paid, in whole or in part, with monetary appropriations from the City of Cincinnati.

STATEMENT OF THE CASE

The Cincinnati Municipal Code provides for "lowest and best" determinations of bids for municipal construction contracts. The City purchasing agent has the discretion to reject any and all bids and the authority to cancel an award at any time before execution of the contract. The Code authorizes the permissive application of a non-exhaustive list of factors that the City purchasing agent may utilize in determining the lowest and best bid for a contract, including a subcontracting outreach program that monitors the proposed

use of minority-owned and women-owned subcontractors by the bidders.

The City began planning for the expansion of its Convention Center in the early 1990s. The City reserved both an overall *project-specific* percentage of the Convention Center work for small businesses and another drywall *contract-specific* percentage for small businesses. That reservation of work for small businesses was race and gender neutral.

In early 2004, Cleveland Construction submitted a bid to the City for the Convention Center drywall contract work. However, Cleveland Construction did not include the specified percentage of small businesses in its bid and the bid was deemed nonresponsive for that reason. The contract was thereafter awarded to another drywall contractor who had met the specific percentage for small businesses. It was uncontroverted that the subcontracting outreach program tracking the use of minority-owned and women-owned subcontractors in bids was not a factor in evaluating the Convention Center drywall contract bids.

On March 30, 2004, Cleveland Construction filed suit for injunctive relief and damages, claiming that the City violated its rights under the Cincinnati Municipal Code and its rights to procedural due process and equal protection. During the proceedings below, the City conceded that its disparity study did not justify remedial race-based or gender-based quotas for the hiring of construction contractors to rectify the effects of past discrimination.[10] The lower courts concluded that there

[10] The City stipulated in the Court of Common Pleas that the part of the subcontracting outreach program tracking minority-owned and women-owned subcontractors included in bids did not satisfy strict judicial scrutiny.

was no evidence that the City's subcontracting outreach program caused Cleveland Construction to be an unsuccessful bidder for the Convention Center drywall work and did not grant Cleveland Construction's equal protection claim for damages. However, the lower courts did enjoin the City from prospectively applying its subcontracting outreach program as part of the list of non-exhaustive permissive factors for determining "lowest and best" bids.

The trial court ruled that the City's subcontracting outreach program "indisputably pressures" contractors to recruit and use minority-owned and women-owned subcontractors. The trial court concluded that the subcontracting outreach program did not satisfy strict judicial scrutiny and that Cleveland Construction prevailed on its facial challenge to the program.[11] Citing decisions from the Ninth, Sixth, and D.C. Circuits, the Ohio First District Court of Appeals affirmed.[12] The Ohio First District Court of Appeals held: "Where regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny."[13]

The Ohio First District Court of Appeals described its rationale: "Where the city's SBE program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences."[14] The Ohio First District Court of Appeals also

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[11] App. 69.

[12] App. 22-26.

[13] App. 24.

[14] App. 25.

ruled that "[t]o the extent that the rules pressured bidders to hire women-owned subcontractors, the city was required to demonstrate an "exceedingly persuasive" justification for the differential treatment." The Ohio First District Court of Appeals ruled that the program failed strict or other heightened scrutiny and enjoined its operation.[15]

REASONS FOR GRANTING THE WRIT

I. The Equal Protection Question Presented in This Petition is the Question Left Unanswered in *Parents Involved in Community Schools v. Seattle School District No.1*, 127 S.Ct. 2738 (June 28, 2007).

This Court recently held that "racial classifications" resulting in *mandatory* government decisions based *solely* on race were subject to strict judicial scrutiny.[16] The plurality stated: "It is well established that when the government distributes burdens or benefits *on the basis of* individual racial classifications, that action is reviewed under strict scrutiny."[17] In that case, students were categorically and oversimplistically classified by race, and school placement decisions were made based solely on a student's race. The Court reiterated that "the Government must treat citizens as individuals, not as simple components of a racial, religious, sexual or national class."

By contrast, the City's subcontracting outreach program is part of a nonexhaustive list of factors subject to discretionary consideration by the City's purchasing agent, and the City's

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[15] App. 25-26.

[16] *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (June 28, 2007).

[17] *Id.* (emphasis added).

"lowest and best bid" procurement decisions are not based solely on compliance with the subcontracting outreach program. This Court even acknowledged in *Parents Involved in Community Schools* that setting measurable objectives to track the achievement of students from major racial and ethnic groups was very different than the invalidated racial classification in the case and had "nothing to do with the pertinent issues...."[18]

Justice Kennedy's concurring opinion in *Parents Involved in Community Schools* also indicated that certain tracking requirements by race "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."[19] Justice Kennedy emphasized: "Executive and legislative branches . . . should be permitted to employ [certain race conscious policies and procedures] ... with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races."[20]

The lower courts in the case at bar erroneously treated the City's discretionary "lowest and best bid" procurement criteria as a mandatory "racial classification" and erroneously subjected the "lowest and best bid" procurement criteria to strict scrutiny. Unlike the school districts' categorical and oversimplistic racial classifications in *Parents Involved in Community Schools*, the City's nonexhaustive discretionary criteria do not mandate a procurement decision based solely on

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[18] *Id.*

[19] *Id.* at p. 2792.

[20] *Id.*

race. Rather, the City's procurement agent *may* consider, as one nonexhaustive factor, a bidder's compliance with the subcontracting outreach program.

Municipalities are generally vested with broad discretion in matters related to the awarding of a public contract, and disappointed bidders do not have a protected property interest in the award of a lowest and best bid public contract.[21] The City's subcontracting outreach program, as identified in Cincinnati Municipal Code §321-37(c) and enjoined by the lower courts, is part of a nonexhaustive list of factors that *may* be used to determine the lowest and best bid. The City's procurement code does not solely consider a bidder's compliance with the subcontracting outreach program when determining the lowest and best bid, nor does it even require that the City purchasing agent examine the bidder's compliance with the subcontracting outreach program in every case. The City's procurement code therefore does not mandate a particular decision on the part of the City when determining the lowest and best bid. As a consequence, the City's procurement code does not fall within the meaning of the equal protection rule established in *Parents Involved in Community Schools* and the lower courts erred by applying strict scrutiny to the code.

This Court should grant this petition for writ of certiorari to establish the line between government programs promoting equal opportunity that are *not* subject to strict scrutiny and those mandatory racial or gender classifications that *are* subject

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[21] The lower courts ruled that Cleveland Construction had a legitimate claim of entitlement to the Convention Center drywall contract. The Supreme Court of Ohio accepted jurisdiction over the City's appeal and that matter is pending. *City of Cincinnati v. Cleveland Construction, Inc.*, Supreme Court of Ohio, Case No. 07-0114.

to strict or other heightened scrutiny. Alternatively, the Court should grant the petition and remand for further consideration in light of the Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.

II. The Strict Scrutiny Rule of *Adarand Constructors v. Pena* and the Federal Circuit Cases Cited Below Does Not Apply to a Discretionary, Non-Mandatory Municipal Outreach/Tracking Program Designed to Promote Equal Opportunities for Minority-Owned and Women-Owned Businesses.

The City's subcontracting outreach program promotes fair opportunities for minority-owned and women-owned businesses to participate in government contracts to the extent of their availability. It strikes a legal balance between the ability to monitor the participation of minority-owned and women-owned businesses in City contracts and the imposition of race and gender-based mandates. The program does not create quotas or set-asides. It does not mandate that the City's purchasing agent select a bidder for a government contract based upon compliance with the program. The lower courts erred by applying strict or other heightened scrutiny to the City's subcontracting outreach program. As described below, the federal courts have applied strict scrutiny when a racial classification serves as an incentive, a pressure, or an obligation to favor one group over another. Some federal courts have recognized, however, that an outreach program may not be subject to strict scrutiny as a racial or gender classification, a distinction that the Ohio First District Court of Appeals failed to recognize in the case at bar.

The Ohio First District Court of Appeals overbroadly relied upon *Adarand Constructors v. Pena*[22] for its conclusion that the City's subcontracting outreach program was subject to strict scrutiny.[23] *Adarand*, like *Parents Involved in Community Schools*, *supra*, considered "racial classifications" that mandated different treatment of individuals based solely on race. In *Adarand*, the challenged regulations provided a financial incentive to bidding contractors to grant a preference to minority subcontractors. The City's subcontracting outreach program, by contrast, does not grant a financial incentive to bidding contractors, yet the Ohio First District Court of Appeals failed to recognize this important distinction.

For further support of its erroneous conclusion that the City's program was subject to strict judicial scrutiny,[24] the Ohio First District Court of Appeals cited the inapposite *Lutheran Church-Missouri Synod v. FCC*,[25] *Bras v. California Pub. Utils. Comm.*,[26] *Monterey Mechanical Co. v. Wilson*,[27] and *Safeco Ins. Co. of America v. White House*.[28]

In *Lutheran Church-Missouri Synod*, the District of Columbia Circuit Court held that the Federal Communication

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[22] 515 U.S. 200 (1995).

[23] App. 24.

[24] App. 24-25, n. 20.

[25] 141 F.3d 344 (C.A.D.C. 1998), *petition for rehearing en banc denied*,154 F.3d 487 (C.A.D.C. 1998).

[26] 59 F.3d 869 (9th Cir. 1995).

[27] 125 F.3d 702 (9th Cir. 1997).

[28] 191 F.3d 675 (6th Cir. 1999).

Commission's equal employment opportunity regulations were subject to review under the strict scrutiny standard. The Court's reasoning was that the FCC regulations "*oblige* stations to grant some degree of preference to minorities in hiring" by attaining, or approximating, "proportional representation" mirroring "the racial breakdown of their 'metropolitan statistical area.'"[29] The Court characterized the regulations as a "screening device" that created "a strong incentive to meet the numerical goals."[30] The D.C. Circuit emphasized: "Further, and most significant in a station's calculus, the Commission itself has given every indication that the employment profile is a serious matter."[31] The Court added that a government hiring program that "*can and surely will* result in individuals being granted a preference because of their race" constituted governmental action that should be subject to strict scrutiny.[32]

When denying the FCC's petition for rehearing, a majority of the D.C. Circuit reiterated the conclusion that "it is clear that these regulations *do* effectively oblige the Church to implement racial preferences in its hiring decisions" and they "indisputably pressure" race-based hiring decisions.[33] The majority suggested that a regulation that merely "authorizes" a racial preference might not become a racial classification

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[29] 141 F.3d at 351-52 (emphasis added).

[30] *Id.* at p. 353.

[31] *Id.*

[32] *Id.* at p.354 (emphasis added).

[33] 154 F.3d at 491.

subject to strict scrutiny.[34] Nevertheless, those judges concluded that the FCC regulations "unquestionably 'encourage'" racial preferences."[35] They bluntly held that "it is the fact of encouragement ... that makes this regulation a racial classification."[36] The dissenting judges concluded that the regulations did not require or oblige the exercise of racial preferences and therefore were not subject to strict scrutiny.[37]

The D.C. Circuit Court majority's clear emphasis on the role of "encouragement" in determining what constitutes a racial classification subject to strict scrutiny presages the City's challenged subcontracting outreach program and demonstrates the plain error of the Ohio First District Court of Appeals' oversimplistic conclusion that the City's subcontracting outreach program was subject to strict scrutiny: "That does not mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny. *Whether the government can encourage—or even require—an outreach program specifically targeted on minorities is, of course, a question we need not decide.*"[38] The majority held that not "all race conscious measures adopted by the government must be subjected to strict scrutiny."[39]

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[34] *Id.* at n. 5.

[35] *Id.*

[36] *Id.* at p. 492.

[37] *Id.* at pp. 491-92.

[38] *Id.* at p. 492 (emphasis added).

[39] *Id.*

The City's subcontracting outreach program, in contrast to the FCC regulations at issue in *Lutheran Church-Missouri Synod*, does not encourage the hiring of any particular race, which was the essential concern that dictated the D.C. Circuit's conclusion that the FCC regulations were subject to strict scrutiny: "*The imposition of numerical norms based on proportional representation*—which is the core element to what are often referred to as affirmative action, set aside, or quota programs—is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny."[40] The City's subcontracting outreach program does not "impose numerical norms based on proportional representation" and it does not "treat people differently according to [their particular] race."[41] In fact, the D.C. Circuit even suggested that requiring employers to examine the racial composition of their workforces (like the City's program) may be an anti-discrimination enforcement technique that does not implicate racial preferences.[42]

Finally, the majority on the D.C. Circuit emphasized the different relevance of improperly comparing, on the one hand, the proportionality of minorities in the employer's workforce to the proportionality of minorities in the *overall population* and, on the other, comparing the racial composition of those holding at issue jobs to the racial composition of qualified persons in the *labor market*. The former is not "the relevant statistical gauge."[43] The City's subcontracting outreach program, in contrast, focuses on the latter relevant gauge by

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[40] *Id.* (emphasis added).

[41] *Id.*

[42] *Id.* at n. 7.

[43] *Id.* at pp. 493-94.

generally comparing the subcontractors proposed by a bidder with all the qualified minority-owned owned and women-owned subcontractors in the specific labor market.

The Ohio First District Court of Appeals also cited a Ninth Circuit decision, *Monterey Mechanical Co. v. Wilson, et al.*[44] The California statute reviewed by the Ninth Circuit required general contractors to subcontract percentages of work to minority, women, and disabled veteran owned subcontractors, or demonstrate good faith efforts to do so. This was a *mandatory* obligation and the statute required that a contractor's bid be disqualified for noncompliance. The statute *barred* a contract award to a bidder that did not comply with either the percentage goals or the good faith efforts. Relying on its earlier decision in *Bras v. California Public Utilities Commission*,[45] the Ninth Circuit concluded that the mandatory California statute was subject to strict scrutiny.[46]

Bras analyzed a statutory scheme for increasing women, minority, and disabled veteran business enterprise procurement that, according to the majority of the panel, authorized the use of set-asides.[47] The Public Utilities Commission was empowered to sanction utility companies for failing to make acceptable progress.[48] The dissent, by contrast, disagreed and characterized as "specious" the conclusion that set-asides were

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[44] 125 F.3d 702 (9th Cir.1997); App. 24, n. 20.

[45] 59 F.3d 869 (9th Cir. 1995) (also cited by the Ohio First District Court of Appeals; App. 24, n. 19).

[46] 125 F.3d at 711-712.

[47] 59 F.3d at 874.

[48] *Id.* at p. 872.

authorized.[49] The City's subcontracting outreach program does not authorize the use of set-asides and does not empower City officials to sanction bidders for City contracts within the meaning of *Bras*, nor does the City's subcontracting outreach program automatically bar the City's purchasing agent from awarding a contract to a bidder that does not meet certain percentage goals.

The Ohio First District Court of Appeals also relied upon the inapposite Sixth Circuit decision in *Safeco Ins. Co. of America v. City of White House, Tennessee*[50] to justify its conclusion that the City's subcontracting outreach program was subject to strict scrutiny. In *Safeco*, the Sixth Circuit evaluated USEPA requirements regarding subcontracting with minority-owned and women-owned businesses. The Sixth Circuit explained that the EPA regulation "anticipates the formulation of numerical objectives (through recipients' 'fair share objectives'), or at least the creation of subcontracting 'goals.'"[51] The Sixth Circuit further concluded that the EPA interpreted its regulation in a manner "requiring an outcome resulting in the hiring of an MBE subcontractor."[52] The Sixth Circuit indicated that strict judicial scrutiny applies only where "outreach" "'indisputably pressures' contractors to hire minority subcontractors."[53] The Sixth Circuit discussed "onerous burden[s]" and elements like "[d]ocumentation requirements and the geographic scope of solicitation" that had

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[49] *Id.* at p. 878.

[50] 191 F.3d 675 (6th Cir. 1999); App. 24, n. 6.

[51] *Id.* at p. 690.

[52] *Id.* at p. 691.

[53] *Id.* at p. 692.

to be considered to determine whether there was indisputable pressure on contractors to hire minority-owned subcontractors.[54]

In *Safeco*, the Sixth Circuit surveyed the conflicting rulings by other circuit courts and stated: "Outreach efforts may or may not require strict scrutiny."[55] The application of strict scrutiny turned on whether the government program was, in reality, a "racial classification" that mandated the hiring of minority-owned firms. If the required outreach does not mandate the government hiring of minority-owned firms then strict scrutiny does not apply.

Similarly, the D.C. Circuit in *Lutheran Church-Missouri Synod*, *supra*, distinguished outreach from actual hiring and expressly did not reach the question "[w]hether the government can encourage—or even require—an outreach program specifically targeted on minorities."[56] In *Safeco*, the Sixth Circuit indicated that the Second Circuit distinguished unobjectionable solicitation efforts from improper "set-asides,"[57] and that the Eleventh Circuit ruled that "strict scrutiny is generally inapplicable" to outreach efforts that target one race.[58]

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[54] *Id.* at p. 691.

[55] *Id.* at p. 692.

[56] 154 F.3d at 492.

[57] 191 F.3d at 690 (discussing *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992)).

[58] *Id.* at p. 692 (quoting *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999)).

Since the landmark holding in *Adarand*, the jurisprudence of "racial classifications" has developed nuances. Although *Adarand* provides that "racial classifications" must be subject to strict scrutiny, at least two federal courts of appeals have extended the *Adarand* analysis by recognizing the distinction between "racial classifications" that result in "indisputable pressure" and outreach programs that promote equal opportunities for minorities and women. The D.C. Circuit in *Lutheran Church-Missouri Synod* and the Sixth Circuit in *Safeco* both distinguished outreach programs from those "racial classifications" that "indisputably pressure" contractors to favor certain subcontractors over others based solely on race. Each court of appeals acknowledged that an outreach program is not automatically a "racial classification" subject to strict scrutiny.

In relying on *Safeco* to support its holding in the case at bar, the Ohio First District Court of Appeals overbroadly applied strict and other heightened scrutiny to the City's subcontracting outreach program because the City's program does not mandate the hiring of minority-owned or women-owned firms. The City's subcontracting outreach program, in contrast to the program scrutinized in *Safeco*, did not require an outcome resulting in the hiring of minority or women-owned subcontractors. It did not impose "indisputable pressure" on bidders to utilize minority or women-owned subcontractors. Moreover, under the Cincinnati Municipal Code, application of the program to a particular "lowest and best bid" procurement was facially discretionary.

The City's program is not a racial classification, it is not an improper "set-aside," and it does not mandate an outcome resulting in the hiring of minority-owned or women-owned firms. Strict scrutiny does not apply. The Ohio First District Court of Appeals' overbroad invalidation of legitimate outreach efforts subjects public entities to unwarranted equal protection

lawsuits and, in the case at bar, erroneously enjoined the City's program.

CONCLUSION

The City's permissive "lowest and best" consideration of public contract bidders' efforts to use minority-owned and women-owned subcontractors to the extent of their availability is not mandatory, is not the sole criteria for the municipality's procurement decision, is not a "racial classification" or a "gender classification," and does not "indisputably pressure" bidders to utilize minority-owned and women-owned subcontractors. The lower courts erred by applying strict and other heightened scrutiny to the City's subcontracting outreach.

This Court should grant this petition for writ of certiorari to reverse the rulings of the lower courts and to clearly establish that the City's outreach effort to achieve equality of *opportunity* for municipal contracts is not subject to strict or other heightened judicial scrutiny. This Court and some federal circuit courts have indicated that tracking efforts, like the City's subcontracting outreach program, are not subject to strict or other heightened scrutiny. Alternatively, the Court should grant the petition and remand for further consideration in light of the decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.

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